

¹ The Award Nunc Pro Tunc is stamped November 18, 2010. It was signed by ALJ Yates Roberts and was prepared and approved by Mr. Downing and Mr. Rathmel.

ISSUES

These are claims for injuries to claimant's upper extremities. In Docket No. 1,025,085, the date of accident alleged is a "series of repetitive traumas commencing in July 2005 through August 1, 2005."² In Docket No. 1,032,810, the date of accident alleged is a "series of repetitive traumas for each day worked through September 2006."³

In the November 4, 2010, Award, ALJ Yates Roberts determined, among other things: (1) claimant sustained a 10% functional impairment to the left wrist, a 10% functional impairment to the left elbow, and a 5% functional impairment to the right shoulder, all attributable to the work-related injuries; (2) the right shoulder complaints were a natural and probable consequence of claimant's original injury and, therefore, the right shoulder is compensable as such; given this finding, all other issues regarding Docket No. 1,032,810 are moot; (3) claimant's request for 41 weeks of additional temporary total disability benefits was denied as the ALJ found there was no evidence in the record as to what period of time claimant was claiming the underpayment or his entitlement to it;⁴ and (4) respondent and its insurance carriers' request for a credit for an alleged overpayment of temporary total disability benefits from October 20, 2008, through July 21, 2009, was denied as the ALJ found that during that period of time claimant was not at maximum medical improvement, he was released to restricted duty, and respondent did not offer restricted duty to claimant.

In the November 4, 2010, Award, ALJ Yates Roberts awarded claimant benefits under K.S.A. 44-510d based upon the impairment ratings noted above for the left wrist, left elbow and the right shoulder. It appears the ALJ apportioned the 73 weeks of temporary total disability benefits claimant received among the three awards of disability benefits (24.33 weeks of temporary total disability benefits for each award).

In the Award Nunc Pro Tunc, the ALJ found: "Claimant's average weekly wage was \$644.19 for all applicable periods until September 6, 2006, at which time Claimant's fringe benefits were discontinued. Beginning on September 7, 2006 Claimant's wage was then sufficient for the maximum compensation rates of \$467.00 for the August 1, 2005 date of injury and \$483.00 for the September, 2006 date of injury."⁵ The awards of disability

² Application for Hearing (filed Sept. 6, 2005) and amended Application for Hearing (filed May 31, 2006).

³ Application for Hearing (filed Jan. 23, 2007).

⁴ At oral argument before this Board on February 18, 2011, claimant's attorney waived claimant's request for the 41 weeks of additional temporary total disability benefits.

⁵ ALJ Award Nunc Pro Tunc (Nov. 18, 2010) at 1.

benefits for the left wrist, elbow and right shoulder were modified in the Award Nunc Pro Tunc using modified compensation rates.

Respondent and its insurance carriers request the Board find claimant did not suffer a permanent impairment to his right shoulder. They also request a credit for an alleged overpayment of temporary total disability benefits from October 20, 2008, through July 21, 2009. Additionally, respondent and its insurance carriers request that the award for any permanent partial disability benefits be calculated pursuant to the plain language of the statutes and that no apportionment of temporary total disability benefits paid be made. In essence, respondent wants the 73 weeks of temporary total disability benefits deducted from each and every scheduled injury. Respondent and its insurance carriers request the Board modify the November 4, 2010, Award and November 18, 2010, Award Nunc Pro Tunc. In their application for review, respondent and its insurance carriers did not appeal the ALJ's ruling that claimant is entitled to reimbursement of medical mileage.

Claimant contends he suffered two separate series of repetitive traumas arising out of and in the course of his employment. Claimant's counsel relies on a complaint made by the claimant of pain from the right elbow to the right shoulder to Dr. Michael J. Poppa on February 8, 2007. Dr. Vito J. Carabetta's impairment of function ratings of 10% to the left wrist, 10% to the left elbow and 5% to the right shoulder are used by claimant to bolster the argument that claimant suffered a permanent impairment to his left wrist, left elbow and right shoulder.

The issues before the Board on this appeal are:

1. Are respondent and its insurance carriers entitled to a credit for an alleged overpayment of temporary total disability benefits from October 20, 2008, through July 21, 2009?⁶
2. What is the nature and extent of claimant's injuries and impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant alleges he injured his right shoulder in a series of microtraumas through September 2006 that arose out of and in the course of his employment. ALJ Yates Roberts determined claimant sustained a 10% functional impairment to the left wrist and a 10% functional impairment to the left elbow as a result of a series of work-related microtraumas from July 2005 through August 1, 2005. ALJ Yates Roberts ruled the right

⁶ R.H. Trans. at 5.

shoulder complaints are a natural and probable consequence of claimant's left upper extremity injury.⁷

On May 23, 2006, Administrative Law Judge Bryce D. Benedict pursuant to K.S.A. 44-510e and K.S.A. 44-516 appointed Dr. Lynn D. Ketchum as a neutral examiner to "[r]ate such impairments that are alleged to have resulted from the claimant's employment, by using the appropriate edition of the AMA Guides."⁸ On August 14, 2006, claimant was examined by Dr. Ketchum, but ALJ Benedict did not receive a report from Dr. Ketchum until October 24, 2006. Dr. Ketchum diagnosed claimant with very mild bilateral cubital tunnel syndrome and the doctor recommended claimant undergo an MRI of both wrists. On January 10, 2007, after claimant underwent an MRI of both wrists, Dr. Ketchum wrote a supplemental report to ALJ Benedict stating claimant had very mild cubital tunnel syndrome, but he did not require surgery at that time. The doctor also indicated claimant had a chronic sprain of his wrist or wrists. The reports of Dr. Ketchum are contained in the Judge's file of Docket No. 1,025,085.

On May 17, 2007, ALJ Benedict ordered claimant to return to Dr. Ketchum for an additional IME so Dr. Ketchum could "(1) make a diagnosis; (2) opine whether this is related to the employment; (3) make treatment recommendations; (4) to impose any work restrictions; (5) to provide a rating if the Claimant is at MMI."⁹ Dr. Ketchum gave claimant a 15% rating to the right upper extremity excluding his shoulder and a 5% rating to the left upper extremity. Dr. Ketchum gave the ratings "[o]n the basis of mild cubital tunnel syndrome and mild compression of the ulnar nerve at the wrist on the right and mild residual cubital tunnel syndrome on the left."¹⁰ Regarding claimant's shoulder, Dr. Ketchum recommended claimant see a shoulder specialist and ultimately be rated by that specialist. ALJ Benedict's preliminary hearing Order is contained in the Judge's files of Docket Nos. 1,025,085 and 1,032,810 and Dr. Ketchum's report is contained in the Judge's file of Docket No. 1,032,810.

Claimant testified at the May 16, 2007, and July 18, 2007, preliminary hearings about seeing Dr. Ketchum. At the June 25, 2008, preliminary hearing there are references to claimant being evaluated and treated by Dr. Ketchum. The Award of ALJ Yates Roberts does not indicate any of Dr. Ketchum's reports were part of the record. At the regular

⁷ ALJ Award (Nov. 4, 2010) at 6.

⁸ ALJ Order (May 23, 2006) at 1.

⁹ ALJ Order (May, 17, 2007).

¹⁰ Ketchum Report (May 31, 2007) at 2.

hearing none of the parties requested that Dr. Ketchum's reports be made part of the record.¹¹

K.S.A. 44-510e states in pertinent part:

If the employer and the employee are unable to agree upon the employee's functional impairment, such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

The Kansas Court of Appeals has ruled that the above quoted language creates "a narrow exception to the general rule of K.S.A. 44-519" which precludes introduction of health care provider's reports unless supported by the testimony of the health care provider.¹²

K.S.A. 44-515(e) is also applicable and states:

Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

In addition, K.S.A. 44-516 should be considered and it states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross examine each neutral physician so employed. The fee of the neutral physician giving such

¹¹ R.H. Trans. at 9-10.

¹² *Sims v. Frito Lay, Inc.*, 23 Kan. App. 2d 591, 933 P.2d 161 (1997); see also *McKinney v. General Motors Corp.*, 22 Kan. App. 2d 768, 921 P.2d 257 (1996).

testimony shall be assessed as costs to a party at the administrative law judge's discretion.

The administrative regulation requires the report of a neutral physician to be made a part of the record of hearing. It is further noted that the parties "may" cross-examine the physician. Three administrative law judges and a special administrative law judge issued orders and/or awards in these two claims. The orders appointing Dr. Ketchum to examine or treat claimant were contained in two different Judge's files in these claims. At the regular hearing, ALJ Yates Roberts apparently was unaware of the preliminary hearing orders of ALJ Benedict appointing Dr. Ketchum to diagnose, address causation and rate claimant, nor did she address Dr. Ketchum's ratings in the Award or Award Nunc Pro Tunc. Counsel for claimant and respondent and its insurance carriers did not inform ALJ Yates Roberts that Dr. Ketchum's reports and ratings needed to be made part of the record.

This Board has previously held an ALJ is required to consider the entire record. In the *Martindale*¹³ case, this Board remanded the Award to the ALJ for further decision where the ALJ did not consider the testimony of a doctor whose testimony was taken prior to the terminal dates. Therefore, these claims are remanded to the ALJ for further decision on all issues with instruction that the ALJ is to include Dr. Ketchum's medical reports as part of the record. Further, the ALJ and the parties are to be mindful of *Redd*¹⁴ wherein the Kansas Supreme Court determined there shall be a separate award calculation for each injury level.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board remands these claims to the ALJ.

The November 4, 2010, Award and the November 18, 2010, Award Nunc Pro Tunc entered by ALJ Yates Roberts are remanded for further decision on all issues.

IT IS SO ORDERED.

¹³ *Martindale v. Cessna Aircraft Company*, 1997 WL 557531, No. 208,690 (Kan. WCAB Aug. 25, 1997).

¹⁴ *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

¹⁵ K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of April, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carriers
Marcia L. Yates Roberts, Administrative Law Judge